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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1010

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

JOHN FRANK LEDBETTER, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Warden of the Maryland Penitentiary, by Francis B. Burch, Attorney General of Maryland, and R. Randolph Victor, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 22, 1966. The case was argued before the Court sitting *En Banc* on January 5, 1966.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Circuit Court of Appeals are printed in the Appendix, hereto, *infra*, pages 1a-15a, and are reported in *Ledbetter v. Warden*, 368 F. 2d 490 (4th Cir., 1966).

The opinion of the United States District Court for the District of Maryland which was affirmed by the majority

opinion of the Circuit Court of Appeals is printed in the Appendix hereto, *infra*, pages 17a-24a. The opinion is reported in *Ledbetter v. Warden*, 239 F. Supp. 369 (D.C. Md., 1965).

JURISDICTION

As aforementioned, the judgment of the Circuit Court of Appeals was entered on September 22, 1966 (Apx. 16a). A judgment in lieu of mandate was issued to the District Court for the District of Maryland on October 25, 1966. It thereafter became necessary to file in this Court an Application for Extension of Time for Filing Petition for Writ of Certiorari. On December 22, 1966 an Order was signed extending the time for the filing of the within Petition to and including January 27, 1967. A Petition to Recall and Stay the Mandate of the Court of Appeals was filed in that Court on or about the 7th day of January, 1967, and the judgment in lieu of Mandate was recalled in an Order filed on January 10, 1967. It was further ordered that the Mandate be stayed pending this application for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Were the incriminating oral admissions and the signed statement of John Frank Ledbetter, Jr., the Respondent herein, made freely and voluntarily, and therefore properly admissible as evidence at his trial for murder in the first degree in the Criminal Court of Baltimore, Maryland in 1960?

2. Assuming that they were not, did the Respondent's experienced trial counsel's failure to object to the introduction of the evidence in question waive his rights to later question the admissibility thereof?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are Citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

By a three to two decision, the United States Court of Appeals for the Fourth Circuit affirmed a decision of the United States District Court for the District of Maryland and held, as did the District Court, that the signed statement given by Mr. Ledbetter to the Police Officers who were interrogating him and certain oral admissions made by him soon after his arrest, and testified to at his trial by Officer Moser, must be considered to have been involuntary or coerced by the totality of the circumstances; and were therefore obtained in violation of his due process rights. The Court of Appeals also agreed with the District Court's finding as to the question of waiver and stated that:

> "We also agree that trial counsel's failure to object to the admission of the written confession and oral statement did not forfeit Ledbetter's right to challenge his conviction by federal habeas corpus." (368 F. 2d at page 493 and Apx. 5a).

The dissenting opinion written by Judge Albert V. Bryan, joined therein by Chief Judge Clement F. Haynsworth, Jr. held that the oral admissions and signed confession were not in fact involuntary, and there was therefor no reason for Mr. Ledbetter's trial counsel to object to the evidence relating to his statements.

The facts relevant to a decision by this Court on this Petition for a Writ of Certiorari are as follows:

John Frank Ledbetter, Jr., the Respondent herein, was found guilty of murder in the first degree by a Jury in the Criminal Court of Baltimore on February 24, 1960. He had been charged along with three other defendants under two separate indictments for the murder and robbery of Lawrence North at Baltimore and Smallwood Streets in Baltimore, Maryland, on August 7, 1959. As aforementioned, the Jury found him guilty on the murder indictment but he was found not guilty of robbery. He was sentenced to life imprisonment. After the denial of a motion for a new trial, an appeal was filed in the Court of Appeals of Maryland where the judgment and sentence were affirmed. *Ledbetter v. State,* 224 Md. 271, 167 A. 2d 596 (1961). The questions there raised related to the sufficiency of the evidence and claimed inconsistency in the verdict of the Jury. The opinion of the Court of Appeals of Maryland is printed in the Appendix hereto, *infra,* pages 26a-29a.

Subsequently, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of Maryland. This Petition was denied for failure to pursue available State remedies under the Maryland Post Conviction Procedure Act, Article 27, Sections 645A-645J Annotated Code of Maryland (1964 Cummulative Supplement now 1966 Cummulative Supplement). In compliance with the District Court's Order, a Petition was filed under the Act in the Criminal Court of Baltimore, which was denied, as was an application for leave to appeal from the lower court's order filed in the Court of Appeals of Maryland. *Ledbetter v. Warden,* 234 Md. 643, 200 A. 2d 81 (1964) and printed in the Appendix hereto, *infra,* pages 30a-32a.

Thereupon, a second Petition for Writ of Habeas Corpus was filed in the District Court and the Respondent was granted a hearing on the allegations raised therein. The District Court, as evidenced by its opinion filed in the proceedings and included in the Appendix hereto found that all of the allegations were without merit with the exception of one. As set forth above, the Court found that the oral admissions of guilt made by the Respondent soon after his arrest and his signed statement were involuntary or coerced by the totality of the circumstances; and that, therefore, the admission into evidence of Officer Moser's testimony relating to the admissions made to him and the use of the signed statement deprived the Respondent of a constitutional right guaranteed by the Fourteenth Amendment. The Court further found that the Respondent did not knowingly waive his rights, even though there were no objections entered at the time that the evidence was introduced.

At the habeas hearing, Mr. Ledbetter testified that he was nineteen years old at the time of his arrest at Wilson's Restaurant in Baltimore, Maryland, where he was employed, and that he had completed the eighth grade in school. He was arrested on Tuesday, August 11, 1959, at approximately 3:00 p.m., although subsequent testimony established that he was arrested at approximately 4:00 p.m. He was taken directly to Southwestern District Police Station where he was told he had been arrested for questioning about the murder and robbery of Mr. North. He was placed in a room with three police officers where he remained for 25 or 30 minutes. Mr. Ledbetter's testimony relating to his chain of custody from the time of his arrival at the station at approximately 5:00 p.m. until he was taken to Sergeant Kendrick for interrogation at approximately 8:00 p.m., was somewhat confusing. However, he testified

that at no time was he advised of any of his rights or that he was entitled to a lawyer. He further testified that he requested permission to make a telephone call which was denied. The reason for his request, as he explained, was that he wanted to call his family for assistance. He alleged that upon the denial of his request he was questioned about his whereabouts on the date of the incident in question. He further asserted that another request to make a telephone call was submitted to the Sergeant who took his statement, and was likewise denied. However, the review of his testimony establishes that he only alleged one such request during his first two hours at the Police Station. He also charged that an Officer who had him in custody during this period threatened to shoot him if he ran. In addition to this, he claimed that he requested to see his cousin, Geraldine, who had been brought to the station before his arrival. The apparent reason for her presence there was that one of the other participants in the crime had attempted to establish an alibi by claiming that he had been out with her at the time that the offense was committed. Mr. Ledbetter stated that his only reason for wanting to see her was to ask her why she had been brought there.

Subsequently, Mr. Ledbetter was taken to Sergeant Kendrick who asked him to give a statement. He disclosed that Jerry Dennis' statement was shown to him and that Taylor, another participant, was brought into the room. At this point the Sergeant began questioning him and his answers were typed by one of the officers present. He admitted that he was not threatened in any way. At this point in his testimony, he again claimed that before the statement was begun he asked to call his family. He did not deny signing the statement, but he maintained he did not read it.

On cross-examination, he explained that he advised his lawyer that he had signed the statement. His past record consisted of operating a motor vehicle while under the influence of alcohol and of possessing alcohol while a minor. He had been in police custody for the latter offense.

The attorney who represented Mr. Ledbetter at his trial having been retained by his family to do so, explained that he learned of the oral admissions made to Officer Moser on the morning of the trial. He did, however, have prior knowledge of the signed statement.

Relative to the confession, Sergeant Albert Kendrick testified that his first contact with Mr. Ledbetter occurred at approximately 8:05 p.m. on August 11th when he was brought to him in the interrogation room on the second floor of the Police Station. When he was brought into the room he was introduced to everyone present, after which he was shown the statement previously given by Jerry Dennis. He disclosed that Mr. Ledbetter was in agreement with the contents of Dennis' statement, including the part revealing that there was a prearranged plan to rob Mr. North. He was then asked if he wanted to make a statement of his own and he consented. Sergeant Kendrick explained that during the one-half hour interval prior to the commencing of Mr. Ledbetter's statement, the statements given by Jerry Dennis were reviewed orally with him and that the facts therein were verified by him. He described Ledbetter's statement produced at the hearing as ". . . the accurate word for word document that was typewritten as it happened". The witness stated that he did not specifically advise Ledbetter that anything he said would be used against him or that he was entitled to a lawyer, or that he did not have to say anything at all. However, at the time that the statement was taken, as evidenced by the statement itself, Mr. Ledbetter was told

that "No one is going to threaten you or make you any promises and anything you say must be of your own free will. Will you tell us in your own words what you know about the above incident?". After the statement was completed he read it and signed it in the presence of the witnesses. The witness denied that Mr. Ledbetter requested permission to make a telephone call during this period. Concerning the alleged request testified to by the Respondent, the Sergeant explained that because he was the ranking officer on the case any request to call anyone would have to be referred to him for his approval. No such request was made by Mr. Ledbetter or by anyone else associated with him during his period of detention prior to the making of the statement. Furthermore, during the making of the statement Mr. Ledbetter did not request an attorney nor in the witness's opinion, did he seem concerned that he was making a statement in the absence of one.

Officer Charles Moser, who participated in Mr. Ledbetter's arrest, testified that he had been placed in his custody soon after his arrest by Sergeant Donahue. No one else was in the room with the two men. Mr. Ledbetter remained with him until Sergeant Kendrick sent for him for questioning. He stated that during the time that Mr. Ledbetter was in his custody they spoke about general topics and finally they began to discuss the attack on Mr. North. The information given by him relative to the offense was volunteered. The witness could not remember whether a specific request was made to him for permission to make a telephone call, but if there had been such a request, he would have contacted his superior officer, which he did not have occasion to do. He said that in his experience at the Southwestern Police Station no such request had ever been refused. Officer Moser explained that he did not induce any of the incriminating statements made by Mr.

Ledbetter because he did not have the authority to ask any questions, and therefore he did not do so. However, he did make notes of what was said. He did not give Mr. Ledbetter any advice because, as he stated, he was not conducting an investigation.

Sergeant John Donahue, also present when Mr. Ledbetter was arrested, testified that when he was taken to the Police Station and booked, the Desk Sergeant was told that Ledbetter was being held for investigation. At that time no charges were placed against him. The witness could not recall whether there had been a request to make a telephone call while they were proceeding to the station. He was certain, however, that after their arrival, he heard no such request. This witness had no further contact with Mr. Ledbetter until the signed statement was given to Sergeant Kendrick. Proceeding on with his testimony, Sergeant Donahue disclosed that when Mr. Ledbetter was brought into the room and shown Dennis' statement, he replied ". . . that's true". He further explained that if a request to make a telephone call had been made at this point, the request would have been granted, even while the statement was in progress.

Detective William Rawlings, one of the witnesses to the statement, testified that his first contact with Mr. Ledbetter occurred during the conversation prior to the commencing of the statement. He recalled that Officer Moser had advised them that Mr. Ledbetter had made certain admissions to him and, at the time, Mr. Ledbetter acknowledged this. Detective Rawlings was present during the entire time that the Respondent was in the room. To his knowledge there was no request to make a telephone call. Mr. Ledbetter made no complaints, he was not threatened, and no promises were made to him. In the witness's opinion, the statement was given voluntarily.

At the conclusion of the hearing granted on Mr. Ledbetter's Petition for a Writ of Habeas Corpus, and the argument of counsel, the District Court ordered that Mr. Ledbetter be released unless the State of Maryland entered an appeal or elected to retry him. (Apx. 24a-25a). An appeal was then filed from the aforementioned ruling of the District Court on behalf of the Warden of the Maryland Penitentiary in the United States Court of Appeals for the Fourth Circuit. That Court found that the judgment of the District Court must be affirmed because of the applicability of the principles enunciated by this Court in the cases of *Haynes v. Washington*, 373 U.S. 503, 10 L. Ed. 2d 513, 83 S. Ct. 1336 (1963) reaffirmed in *Davis v. North Carolina*, 384 U.S. 737, 16 L. Ed. 2d 895, 86 S. Ct. 1761 (1966). The Court stated that its conclusion was not impaired by the recent decision of this Court in *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966).

REASONS FOR GRANTING THE WRIT

Your Petitioner believes that the following reasons for granting a Writ of Certiorari exist in the instant case.

Your Petitioner will discuss separately each of the following reasons for granting same.

1. The facts and circumstances surrounding the making of the oral admissions and the signed statement by Mr. Ledbetter shortly after his apprehension at his place of employment do not substantiate a finding that they were involuntary or coerced by the totality of the circumstances.

2. The decisions of this Court relied upon by the majority in support of the Opinion filed in these proceedings in the United States Court of Appeals for the Fourth Circuit do not enunciate the standards to be applied in determining the voluntariness of Mr. Ledbetter's oral admissions and

his signed statement at the time of the making thereof, and at the time of their admission into evidence, therefore, the evidence in question was properly admissible at the time of his trial.

Your Petitioner has set forth as a second question presented the issue of whether or not experienced trial counsel's failure to object to the introduction of the evidence in question waived the Respondent's right to later question their admissibility. This issue will not be discussed further in this Petition for Writ of Certiorari since the Petitioner merely wishes to preserve it in the event that this Court sees fit to grant the Writ of Certiorari for any other reason set forth herein. Assuming that this Court agrees with the findings of the Courts below that the oral admissions and the signed statement were involuntarily made, your Petitioner believes that the fact that there was a deliberate waiver as a part of trial tactics will be fully evident from the record in this case.

I.

THE FACTS AND CIRCUMSTANCES SURROUNDING THE MAKING OF THE ORAL ADMISSIONS AND THE SIGNED STATEMENT AS REVEALED BY THE RECORD DO NOT SUBSTANTIATE A FINDING THAT THEY WERE INVOLUNTARY OR COERCED.

Your Petitioner has contended from the outset that the oral admissions made by the Respondent herein and his signed statement given thereafter were voluntary and that the testimony of Officer Moser relating to the admissions and the use of the Respondent's confession at his trial were not a deprivation of a constitutional right guaranteed to him by the Fourteenth Amendment.

As aforementioned, the District Court found otherwise and cited as authority in support of its finding the cases of *Haynes v. Washington, supra; Escobedo v. Illinois,* 378 U.S.

478, 12 L. Ed. 2d 977 (1964); *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964), 1 A.L.R. 3d 1205. The Court further cited *Miller v. Warden*, 338 F. 2d 201 (4th Cir., 1964); *Thiess v. State*, 235 Md. 541, 201 A. 2d 790 (1964); and *Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961).

In affirming the judgment of the District Court, the United States Court of Appeals for the Fourth Circuit relied primarily upon the decisions of this Court in *Haynes v. Washington, supra; Davis v. North Carolina, supra,* and the decision of that Court in *Miller v. Warden, supra.* In so doing, the majority of the Court stated that:

> "We agree with the District Court that from the totality of circumstances, Ledbetter's confessions were obtained in violation of his due process rights. This youth was alone in the hands of the police, and his requests to contact his family were refused. He was not told of his right to maintain silence, or that his statements might be used against him. And he was not informed of his right to an attorney. Considered against the background of Ledbetter's age and education we think the District Court correctly found that the confessions were not voluntarily given." (368 F. 2d at page 492 and Apx. 3a).

The majority of the Court in holding that the principles of *Haynes* and *Davis, supra,* are applicable to the instant case was of the opinion that the difference in the factual situations in those cases is not decisive to the application of the principles to the facts in this case.

Judge Bryan in his dissent, speaking for himself and Chief Judge Haynsworth, recognized that none of the decisions referred to mechanically converted into involuntary declarations, those which were examined carefully at trial and found to be voluntary. He is of the opinion, as is your

Petitioner, that the cases cited were intended to announce that certain circumstances are significant factors tending to prove coercion or some other unfair influence. These circumstances are merely to be included in the totality of circumstances to be considered in deciding whether a confession was made voluntarily. (And, as set forth in your Petitioner's succeeding reason for granting the writ, there is a very real question as to whether the circumstances present herein apply to the totality of circumstances surrounding the making of the Respondent's statements, at the time that they were made, if this Court concludes that the statements were in fact involuntary on the facts in the record).

This then is the contention of your Petitioner. Clearly, the cases cited in the majority opinion of the Court of Appeals and those cited by the District Court in support of its conclusions have been expanded by those Courts beyond the scope of the factual situations which they were intended to encompass. Assuming that this Court's decision in *Haynes, supra,* sets forth the standards to be applied in determining the voluntariness of the Respondent's oral admissions and signed statement, it is respectfully submitted that the facts and circumstances revealed by the record in the instant case do not justify the judgment of either the District Court or the Court of Appeals based upon the standards of voluntariness enunciated in *Haynes* or *Davis.*

Because of the recent decision of this Court in *Johnson v. New Jersey,* 384, U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966), the question is somewhat more limited than that before the Court of Appeals at the time that this case was argued. Due to the clear pronouncement that the principles of *Escobedo v. Illinois, supra,* are not applicable here, your Petitioner need only set forth his contentions regarding the applicability of the decisions of this Court cited by

the majority of the Court of Appeals. Your Petitioner's submission will set forth his belief that the principles in the cases relied upon are simply not applicable here.

In examining the facts of the instant case against the background of those in *Haynes,* your Petitioner readily concedes that the Respondent was not specifically advised of his right to remain silent, of his right to an attorney, or that any statement he made might be used against him. However, the testimony, as well as the statement, itself established that he was advised that ". . . No one is going to threaten you or make you any promises and anything you say must be of your own free will". Clearly, this can be construed to establish an understanding on the part of the Respondent that he had a right to remain silent. There was no showing that he was of below average intelligence and as he himself testified, he was nineteen years old at the time of his arrest, he had completed the eighth grade of school, he had a record of minor offenses, and had been in police custody on a prior occasion. Thus, the question is reduced to this, what effect, if any, did the failure to specifically advise the Respondent of his rights have on the admissions and confession when the uncontradicted evidence established that he did not request legal assistance at any time during his detention. Clearly, the alleged request, if in fact made, to call his family cannot be construed to amount to a request for the legal assistance that the cases contemplate.

Again, assuming for purposes of argument, that *Haynes, supra,* is applicable to the instant case, it is respectfully suggested that even by resolving every possible inference to be drawn from the evidence before the District Court in favor of the Respondent, this would not bring this case within its purview.

In *Haynes, supra,* the Petitioner's confession was taken on the day after his arrest, and on the evening of his arrest he made several specific requests to the police that he be permitted to call an attorney and to call his wife and each was refused. Early in the interrogation he asked that he be at least permitted to talk to the prosecutor before proceeding further. The police who took his statement did not deny the allegations of the Petitioner that he would be allowed to call his wife if he cooperated and gave a statement. He was not advised of his rights and he was held incommunicado in an effort by the police to obtain his signature on another statement. He was not able to call his wife until five or seven days after his arrest. Thus, on these facts, this Court found that the confession was given only after consistent denial of his request to call his wife and a promise that he could call her if he cooperated. This Court found that this, along with the threat of continued incommunicado detention produced a confession that was not the product of a free and unconstrained will.

Clearly, the facts in the instant case in comparison to those in *Haynes,* do not warrant a finding based on the principles of that case, that the Respondent's oral admissions and his signed statement were the product of a will overborne.

The facts in the case of *Davis v. North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895, 86 S. Ct. 1761 (1966) are also clearly distinguishable from those in the instant case. For this reason, your Petitioner respectfully submits that this Court's decision therein is likewise not applicable here. Davis, an impoverished Negro with a third or fourth grade education and an escapee from a state prison camp was convicted in North Carolina of rape-murder. At his trial, a written confession and testimony relating to an oral confession were offered in evidence. The record revealed that after he had

been taken into custody he was interrogated daily over a period of sixteen days. There was no indication that the police advised him of any of his rights until after he had confessed orally on the sixteenth day. In addition to this there was evidence relating to a description of his place of detention and the circumstances surrounding his confinement during this period; evidence of a notation on the arrest sheet that Davis was not to be permitted to see anyone or use the telephone; the testimony of a police captain that he could have issued that order; and a finding of fact by the District Court that from September 21st until October 6th, the date of his confession, Davis saw no one. From the above as well as other evidence in the record, this Court concluded that Davis' confessions were not made freely and voluntarily because his will was overborne by the sustained pressures upon him.

In reversing the judgment of the Court of Appeals, this Court stated:

> "The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. [*Citations omitted*]. We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case. (16 L. Ed. 2d at page 904)."

In the instant case, the Respondent made his oral admissions, as noted by the dissenting opinion of Judge Bryan, after he had been at the police station only an hour and he was in custody not more than six hours for interrogation; and during this time no threats or promises were made to him and no force was used as set forth in the opinion of

the District Court. Certainly, these facts are in sharp contrast to those set forth in the above quoted portion of this Court's opinion in *Davis*.

Thus, from the foregoing, as well as the applicable portions of the record filed in this Court in support of the within Petition, it is readily apparent that the cases cited by the Court of Appeals, as well as the cases cited by this Court in support of its rulings in *Haynes*, and *Davis, supra*, do not support the judgment of the Court below. Upon comparing the facts in the instant case and those in the cases referred to, it is manifest that the Respondent has not been deprived of a constitutional right guaranteed to him by the Fourteenth Amendment.

On the basis of the above, your Petitioner believes that this Court, by granting the within Petition, could clarify the guidelines to be used in determining the specific factors to be considered in deciding upon the issue of voluntariness in cases to which *Escobedo, supra,* and *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) have no application. This belief will be elaborated upon in your Petitioner's next reason as to why the writ should be granted.

II.

THE DECISIONS OF THIS COURT RELIED UPON BY THE MAJORITY OPINION OF THE COURT OF APPEALS IN SUPPORT OF ITS JUDGMENT ENTERED IN THESE PROCEEDINGS DO NOT REQUIRE AN AUTOMATIC FINDING THAT THE EVIDENCE IN QUESTION WAS INADMISSIBLE AS YOUR PETITIONER BELIEVES THE OPINION SEEMS TO INDICATE.

Without conceding that the dissimilarity of the facts in the instant case with those in the cases cited does not remove it from the purview of this Court's rulings in those cases, your Petitioner advances the hereinafter set forth additional reasons why the writ should be granted.

Your Petitioner believes, and therefore respectfully submits, that the standards set forth in the cases cited by the majority in support of its opinion and judgment do not apply because the standards for determining voluntariness in those cases have been extended beyond those proclaimed to be such by the rulings of this Court governing such situations at the time that the evidence in question was obtained and subsequently admitted at the Respondent's trial. The Respondent's oral admissions and his signed statement are voluntary both in fact and in law now and were at the time that they were made approximately three years prior to this Court's decision in *Haynes v. Washington, supra,* and approximately six years prior to the decision in *Davis v. North Carolina, supra.*

In advancing this belief, your Petitioner is aware that voluntariness in fact has always been, and remains the standard and the determinative inquiry. Yet, due to the recent decisions of this Court, it was felt by the Courts below that the admissions and the signed statement were involuntary because certain facts existing therein were similar to those present in the factual situations of the cases cited. It is abundantly clear that other than the traditional standards referred to in *Miranda v. Arizona, supra,* were applied to invalidate the evidence in question. It must be conceded that the failure to advise the Defendant of his right to remain silent and his right to counsel and the failure to grant him permission to make a telephone call, if this occurred, are all facts to be considered in determining voluntariness, but they are facts which do not invalidate a confession *per se.* In the cases cited, these and many more elements contributed to the totality of the circumstances culminating in the decision reached by this Court in each case.

By conceding that the above facts are important in any consideration of voluntariness, your Petitioner does not believe that a Court is justified, or that the decisions require that the oral admissions and the signed statement made in the instant case must be judged by other than the standards required by the decisions of this Court for deciding such questions existing at the time that the evidence was obtained from the Respondent. As set forth by Judge Bryan in his dissenting opinion filed in the Court below; "The instant case *must* be measured for voluntariness in 'traditional terms' for it was concluded before *Miranda* and *Escobedo*". The facts present in this case contributing to the finding of the Courts below are those which prior to *Escobedo v. Illinois, supra,* and *Miranda v. Arizona, supra,* would not have contributed as significantly to a finding of involuntariness although those decisions are not applicable to the instant case. *Johnson v. New Jersey, supra.*

Even in view of this, more stringent standards were applied in determining the admissibility of the Respondent's statements than had been required by the decisions of this Court at the time that the damaging admissions were obtained. Indeed, Chief Judge Thomsen, in his opinion filed in the District Court admitted that in the Court's opinion new standards had to be applied in these cases when he referred to "the tests which must now be applied by the State Courts as well as by this Court (the District Court), . . ." (Apx. 23a). (Parentheses added). Indeed, by including *Escobedo v. Illinois, supra,* as one of its authorities for its opinion, the District Court was in effect, giving a retroactive application to the decision in that case later declared to be improper in *Johnson.* The majority of the Court of Appeals in affirming the judgment of the District Court stated that: "All that the District Court did was to apply

the 'increasingly meticulous' standards of voluntariness to Ledbetter's case." (Apx. 5a).

That the decisions of the Courts below were based upon the decisions of this Court rendered after the date that the Respondent's conviction became final is further emphasized in Judge Thomsen's opinion as to why an objection was not entered to the admission of the testimony relating to the admissions of the Respondent and the admission of the statement itself. Judge Thomsen in finding that the Respondent's counsel did not waive his right to the relief prayed in his Petition filed in the District Court was of the opinion that his trial counsel did not give as much attention to the preparation of this point as he would have given at the time of the habeas hearing in view of this Court's recent decisions. The Court of Appeals in affirming the District Court on the waiver question concluded that at the time of the Respondent's trial, there was no basis for an objection because it took place before this Court fashioned the standard by which the procurement of the admissions and confession were to be judged. On this point, the dissenters held that there was in fact no objection to be made because, at the time, the admissions and statement were in fact voluntary.

It is in this application of the decisions referred to that your Petitioner believes that error was committed. As aforementioned, voluntariness is the test and remains so and the cases cited along with the standards set forth therein do not render the admissions and the statement in question involuntary *per se*. These decisions are not in the words of Judge Bryan's dissent "imbued with an automatic retroactivity".

From the foregoing, it is manifest that the issue raised in the instant case relating to voluntariness should have been

resolved by applying the traditional standards proclaimed by this Court to be applicable to such questions at the time the evidence was obtained and not the standards subsequently found necessary to be included in the determination of voluntariness.

CONCLUSION

For the reasons set forth above, it is apparent that a decision by this Court to grant the writ of certiorari and to review this case would enable this Court to proclaim the guidelines to be used by the Courts in deciding the issue of voluntariness on facts similar to those presented herein; and further proclaim the limitation on the application of the standards to be applied in determining such issues in view of its decisions rendered after the date evidence such as that in question was obtained and after the convictions for which the evidence was used to obtain same have become final.

Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT

United States Court of Appeals
For The Fourth Circuit

No. 10,154

John Frank Ledbetter, Jr.,
Appellee,

v.

Warden, Maryland Penitentiary,
Appellant.

(Argued January 5, 1966 Decided September 22, 1966)

R. Randolph Victor, Asst. Atty. Gen. of Maryland (Thomas B. Finan, Atty. Gen, of Maryland, on the brief) for appellant.

Robert M. Carrico, Jr., Baltimore, Md. (Court-assigned counsel) for appellee.

Ronald P. Sokol, Charlottesville, Va., amicus curiae.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

SOBELOFF, Circuit Judge.

This is an appeal by the State of Maryland from the decision of the District Court, granting appellee John Ledbetter's petition for a writ of habeas corpus. Ledbetter was sentenced to life imprisonment upon his 1960 conviction in the Baltimore City Criminal Court for first degree murder. After Ledbetter has exhausted state remedies,

the District Court conducted a plenary hearing on his claims, and held that oral and written statements, taken from him by the police and used at his trial, had been obtained in violation of the Due Process clause of the Fourteenth Amendment. The District Court further held that the failure of Ledbetter's trial counsel to object to the admission of these statements did not constitute an intelligent waiver under the standards laid down by the Supreme Court. Thus, Ledbetter was ordered released unless the State should retry him without the use of incriminating statements, or note an appeal. We concur in the findings and rulings of the District Court, and the decision will be affirmed.

On the evening of August 10, 1959, police began an investigation of the robbery-murder of Lawrence North. The following morning they arrested and held for investigation one Jerry Dennis, a codefendant in Ledbetter's trial. After some questioning by the police, Dennis confessed, implicating Ledbetter and two others. Acting on this information, the police arrested Ledbetter at his place of work sometime between three and five o'clock that afternoon. Sergeant Kendrick, who issued the arrest order, testified at the District Court hearing that Ledbetter was at that time regarded as a principal in the case, and was picked up in order to be charged.

Ledbetter was nineteen years old, had completed the eighth grade, and from the hearing below it appears that this was his first serious encounter with the police. When he was brought to the station the police were taking a written statement from Dennis, so Ledbetter was kept in a small room guarded by Officer Moser. Although there was some dispute as to whether Moser was actually interrogating petitioner during this interval, the District Court found that Officer Moser led the conversation around to the crime and that Ledbetter made several oral incriminating statements. On the basis of the evidence at the hearing, the District Judge also found that before making these inculpatory statements Ledbetter requested an opportunity to telephone his family, and his request was refused. Moreover, the police admitted that they at no

time advised Ledbetter of his right to remain silent, that any statements he might make could be used against him at his trial, or that he had a right to an attorney.

Later, about 8:30 that evening, Ledbetter was interviewed again, this time by six police officers. The statement which had earlier been given by his accuser, Jerry Dennis, was read to him, and the police again failed to advise Ledbetter of any of his rights. Ledbetter signed a written statement describing his part in the crime. At the trial, conducted in February, 1960, the written confession and Officer Moser's account of the oral admissions were introduced into evidence without objection from the defendant's counsel.

I.

We agree with the District Court that from the totality of circumstances,[1] Ledbetter's confessions were obtained in violation of his due process rights. This youth was alone in the hands of the police, and his requests to contact his family were refused. He was not told of his right to maintain silence, or that his statements might be used against him. And he was not informed of his right to an attorney. Considered against the background of Ledbetter's age and education we think the District Court correctly found that the confessions were not voluntarily given. Haynes v. State of Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); see Davis v. State of North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed, 2d 895 (1966); Miller v. Warden, 338 F. 2d 201 (4th Cir. 1964).

When Ledbetter was refused permission to make a phone call he knew full well that the police intended to hold him incommunicado and pursue their interrogations until they

[1] The District Court hearing was the first inquiry into the circumstances surrounding the confessions. The point was urged in a post-conviction proceeding, but dismissed because it had not been raised on direct appeal. In denying an application to appeal from the denial of post-conviction relief, the Maryland Court of Appeals affirmed this ruling on the ground that the point had been waived at the original trial. See Ledbetter v. Warden, 234 Md. 643, 200 A. 2d 81 (1964).

would bear fruit. The crucial inquiry is the suspect's knowledge that he will continue to be kept incommunicado. The coercive influence cannot be measured by the number of hours Ledbetter was actually detained, but only by the effect upon him of the obvious intention of the police to persist in their secret inquisition without granting his request to communicate with the outer world. The production of a co-suspect's implicating statement, coupled with the denial of access to the telephone, made it clear to Ledbetter that he could gain respite only by confirming the statement. The principle of Haynes v. State of Washington, supra, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513, reaffirmed in Davis v. State of North Carolina, supra, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966), is operative here and the difference in the factual situations is not decisive.

The conclusion that there was a violation of due process here is not impaired by the recent Supreme Court decision in Johnson v. State of New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966). The Court was careful to stress that while it was denying retroactive effect to the safeguards spelled out in Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), nevertheless persons whose trials have been completed before those decisions are not precluded from invoking "a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years." 384 U.S. at 730, 86 S. Ct. at 1779.

> "That test," said the Court, "now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. * * *. Thus, while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have been completed from invoking the same safeguards as part of an involuntariness claim." Ibid.

All that the District Court did was to apply the "increasingly meticulous" standards of voluntariness to Ledbetter's case. Indeed, while the Supreme Court denied Johnson relief on direct appeal, the door was opened to him to make a collateral attack based on the principle of *Haynes* and *Davis:*

> "Petitioners now assert that they were prevented from obtaining outside assistance while they were being interrogated. The police allegedly refused them access to their families or a lawyer and also thwarted the efforts of their relatives and friends to contact them. We have already pointed out that allegations of this kind are directly relevant to a coerced confession claim and that such a claim presents no problem of retroactivity. See also Davis v. State of North Carolina, 384 U.S. post, P. 737, 86 S. Ct. 1761, 16 L. Ed 2d 895." 384 U.S. at 735, 86 S. Ct. at 1782.

The coercion which both *Haynes* and *Davis* condemn is any practice which has the effect of controlling the prisoner's will. The District Court found that this was the effect here, and we uphold that finding.

II.

We also agree that trial counsel's failure to object to the admission of the written confession and oral statement did not forefeit Ledbetter's right to challenge his conviction by federal habeas corpus. In Fay v. Noia, 372 U.S. 391, 438-440, 83 S. Ct. 822, 849, 9 L. Ed. 2d 837 (1963), the Supreme Court acknowledged a "limited" discretion in the District Court to dismiss a habeas corpus petition where the applicant "has deliberately by-passed the orderly procedure of the state courts." This discretion, said the Court, is to be "narrowly circumscribed," however, and the governing standard is the "considered choice of the petitioner", waiver will be implied only where the applicant made "an intentional relinquishment of a *known* right or privilege." Ibid. (Emphasis added.) See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Thus,

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons *that can fairly be described as the deliberate by-passing of state procedures,* then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits. * * *. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * *. A choice made by counsel not participated in by the petitioner does not automatically bar relief." Fay v. Noia, 372 U.S. at 439, 83 S. Ct. at 849 (Emphasis added.)

The District Court found that Ledbetter's counsel did not consult with him concerning the crucial decision not to object to the confession and the oral statement. Cf. United States ex rel. Goldsby v. Harpole, 263 F. 2d 71 (5th Cir. 1958), cert. den., 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78 (1959). And while that fact alone will not necessarily bar a finding of waiver, see Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), the District Court pointed out that the confession and the statement were the *only* evidence linking Ledbetter to the crime. The federal challenge thus went to the very foundation of the proceeding, and waiver should not be implied except in the clearest instance of a deliberate bypassing of state remedies. See Brown v. Allen, 344 U.S. 443, 503, 73 S. Ct. 437, 97 L. Ed. 469 (1953) (Frankfurter, J., concurring); Whitus v. Balckom, 333 F. 2d 496 (5th Cir. 1964).

Any intimation of a deliberate design to knowingly forego the federal constitutional claim is negated by the fact that at the time of the trial, there was no basis on which a trial attorney could reasonably object to this evidence. Ledbetter was tried in 1960, three years before the decision in Haynes v. State of Washington, supra, and other decisions which have subsequently fashioned the standard by which the procurement of this pretrial confession is to

be judged.[2] Thus, as the Second Circuit has pointed out, "[i]t would be the height of unreason * * * to insist that [Ledbetter] should have objected to evidence which was properly admitted under the applicable law at the time of trial." United States v. La Vallee, 334 F. 2d 331, 333 (2d Cir. 1964); see United States ex rel. Angelet v. Fay, 333 F. 2d 12 (2d Cir. 1964). Certainly, the failure to make what would have been at the time a fruitless objection falls far short of the deliberate bypassing of state remedies with which the Supreme Court was concerned in Fay v. Noia.

Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), does not call for a different conclusion. There, the state contended that defendant's challenge to illegally seized evidence was precluded by his local attorneys' failure to raise the objection at trial. The case was tried in 1963, *after* the Supreme Court's decision in Mapp v. State of Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), holding such evidence inadmissible in state criminal proceedings. In an opinion by Mr. Justice Brennan, the author of Fay v. Noia, supra, the Court remanded the case to the state court for a hearing on whether petitioner's counsel had "deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies." 379 U.S. at 450, 85 S. Ct. at p. 569. After restating the waiver standard of Fay v. Noia, the Court noted several possible reasons for a strategic decision to allow the disputed evidence into the case, and observed that if so, deliberate bypassing of the contemporaneous objection rule could be deemed a waiver.

The discussion in *Henry* is simply an application of the waiver principle delineated in Fay v. Noia, and does not purport to alter that standard in any way. It is inapplicable

[2] Four members of the Court (Justices Clark, Harlan, Stewart and White) dissented in Haynes on the grounds that that decision was "an abrupt departure from the rule laid down in the cases of this Court and an enlargement of the requirements heretofore visited upon state courts in confession cases." 373 U.S. at 503, 83 S. Ct. at 1347 (dissenting opinion of Mr. Justice Clark.)

where, as here, there existed no known ground on which the trial attorney could have based an objection at trial. In the context of this case there was therefore no "strategic choice" to be made, and none can be supplied by the fact that when the confession was admitted in evidence — as it inevitably would have been in 1960 — the lawyer made an argument based on it. Since the confession and the statement were the only evidence linking Ledbetter to the offense, it is patent that the attorney — whom the District Court found to be competent — would have objected strenuously to their admission if he had thought that he had any legal ground to do so. His lack of prescience and failure to anticipate the later decisions should not deprive petitioner of his opportunity to assert the constitutional right on habeas corpus.

It is plain that once the police had Jerry Dennis' confession, they interrogated Ledbetter in the hope of insuring his conviction. Cf. Spano v. New York, 360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1961); Malinski v. People of State of New York, 324 U.S. 401, 65 S. Ct. 781, 89 L. Ed. 1029 (1945). But the techniques used to secure the admissions — incommunicado detention and questioning, refusal of outside contacts, and failure to inform the suspect of even his most basic rights — were inherently coercive, and afforded the accused no real choice between admitting and denying his participation in the crime. See Haynes v. State of Washington, supra 373 U.S. at 514, 83 S. Ct. 1336. No matter how guilty a suspect may *appear* to be, our system of law, with jealous regard for his rights, demands that he be accorded due process at every step of the proceedings against him. At the most critical stage of the proceedings against Ledbetter — the evening of his confession — these safeguards were denied him. For this reason, the confession must be excluded from any subsequent trial. See Smallwood v. State of Maryland, 367 F. 2d 945 (4th Cir. 1966).

Affirmed.

ALBERT V. BRYAN, Circuit Judge, dissenting:

I cannot concur in the decision to set aside Ledbetter's conviction because of the admission at trial of his oral and written acknowledgments of guilt. His counsel, in practice for 32 years and declared by the District Court to be "an experienced criminal lawyer engaged by his family", advised the State trial court that he had no objection to the oral and signed statements. Furthermore, had he objected, he would have been overruled as the statements were not in fact involuntary.

The first question, then, is whether a Federal court can set aside the conviction as un-Constitutional because it thinks the attorney ought not to have waived objection, although this decision was the dictate of his best judgment. The other question is whether Ledbetter was so circumstanced when he made the statements that the law imputes involuntariness to them, i.e., were they "the product of a will overborne". Davis v. State of North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (June 20, 1966).

Ledbetter was convicted of first degree murder with life imprisonment. The facts of the homicide are fairly summarized in the opinion of the District Court:

> "The death resulted from the brutal slugging and robbing of an old man by four 19-year-old youths."
>
> * * * * * *
>
> "The four youths [on August 7, 1959] had been drinking together; it is a reasonable inference from all the evidence that they wanted money and decided to rob someone on the street. An old man, walking alone, approached them. According to Ledbetter's confession, Jerry Dennis, one of the four, said: 'I'm gonna get this here one.' Dennis tied a handerchief around his knuckles and slugged the old man on the jaw, causing him to fall and strike his head, which resulted in his death. Ledbetter tried to pull the man out of the street where he had fallen, while the other two robbed him of money and a ring. They left the victim where he lay, and when the police found him, it was thought at first he had had a stroke."

I. Although Ledbetter had not told his attorney of the oral admissions made to the police officers, the attorney had his signed statement before trial and learned of the oral statements on the morning of, but prior to, the trial. He was surprised by the latter, for they were more incriminating than the signed confession. They revealed a foreknowledge by Ledbetter of the intended assault. These statements were obtained, said the District Court, with "[n]o threats or promises * * * made to Ledbetter, and no force * * * used".

A seasoned trial lawyer, Ledbetter's counsel consented to allow all the statements into evidence. Like his attorney, the Maryland Court of Appeals thought the written statement "exculpatory in part". Ledbetter v. State, 224 Md. 271, 167 A. 2d 596, 597 (1961). The move could have been a play for leniency as an exhibition of candor and truthfulness. In any event, it was obviously a tactic the lawyer deemed expedient and wise. As noted by the Supreme Court in Henry v. State of Mississippi, 379 U.S. 443, 451-452, 85 S. Ct. 564, 569, 13 L. Ed. 2d 408, (1965):

> "[C]ounsel's deliberate choice of the strategy would amount to a waiver binding on petitioner * * *. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the *circumstances are exceptional*, preclude the accused from asserting constitutional claims, * * * we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case." (Accent added.)

There is no evidence of "exceptional" circumstances here. Assuming the existence of a basis for an objection, counsel's deliberate strategy in not protesting the statements constituted a waiver binding on Ledbetter. True, the recent Supreme Court decisions in Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (June 13, 1966); Johnson v. State of New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (June 20, 1966); and Davis v. State of North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (June 20, 1966) did not touch upon the issue of waiver at the trial

level.[3] However, if an accused may consent to interrogation before trial, than most assuredly as a defendant with counsel, pari ratione, he may waive objection at trial to otherwise inadmissible statements. At either stage a waiver results in the reception of his incriminating utterances.

Notwithstanding, the District Court ordered the release or a re-trial of Ledbetter, concluding that there was no waiver for the following reasons:

> "It is true that Ledbetter's trial counsel stated that he had no objection to the admission of any of the oral or written statements, but *this was apparently said in the belief, that only the signed statement was to be offered.* In any event, the evidence indicates that counsel took the position without consulting Ledbetter. *Ordinarily such consultation is not necessary where competent counsel is conducting a difficult trial.* Here, however, there was no other evidence in the case connecting Ledbetter with the crime. There is no evidence that Ledbetter knew of the constitutional rights involved. And *it appears from the evidence that trial counsel did not give as much attention to the preparation of this point as he would give today,* in view of the recent Supreme Court decisions. Under all the circumstances the *Court cannot say that Ledbetter's representation by his trial counsel fell below the standard established* by *Snead v. Smythe,* 4 Cir., 273 F. 2d 838 (1959), and later Fourth Circuit cases. On the other hand, this Court cannot say that there was any such waiver of constitutional rights as would meet the tests prescribed by * * * [listed decisions of the Supreme Court]". (Accent added.)

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[3] Nothing to the contrary can be spelled from footnote 69 in Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (June 13, 1966). Aside from the purposeful character of the waiver instantly, the observation in the footnote has no relevancy presently, because it was based on Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) and on *Miranda* itself, both of which are non-retroactive. Johnson v. State of New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (June 20, 1966).

As the District Judge correctly observed and contrary to the implication of the majority, counsel did not have to obtain his client's permission to withhold an objection. Would this court prefer Ledbetter's judgment to that of his experienced counsel, and would it have been fair to leave the determination to Ledbetter? For counsel to have done so would, indeed, have proved his representation inadequate and ineffective.

The critical finding of the District Court of no waiver is simply a speculation. In essence, it is what the judge felt trial counsel *might* have believed or thought or *might do today*. Although Ledbetter's attorney is acknowledged as completely competent, it is surmised that he "did not give as much attention to the preparation of this [evidential] point as he would give today, in view of the recent Supreme Court decisions". The references to "today" and the "recent decisions" bear re-examination in the light of the most recent enunciations, post, declaring the effect on the law of Ledbetter's trial of decisions announced thereafter. I cannot join my brethren in approving a release or new trial order resting on conjecture of the District Court.

II. Nor is the majority willing to do so. It finds no waiver for quite a different reason: *"there was no basis on which a trial attorney could reasonably object to the evidence"*. This is precisely correct. It means, of course, that the oral admissions and signed confession at the time they were offered into evidence were in fact voluntary; thus there was no basis for an objection. Of course, in this context there could be no waiver as Ledbetter had no rights which he or his counsel could waive. But, the majority says, by virtue of *subsequent* decisions, Ledbetter's admissions have become involuntary and thereby subject to collateral attack. Not only do those decisions cited by the majority fail even to intimate a change in the voluntary-involuntary standard, but even if so read, they are not imbued with automatic retroactivity.

The majority finds such involuntariness here from the holdings in the following cases: Davis v. State of North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895

(1966); Haynes v. State of Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Miller v. Warden, 338 F. 2d 201 (4 Cir. 1964). The District Court added Escobedo v. State of Illinois, supra, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Culombe v. State of Connecticut, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961), among others. But none of these decisions mechanically convert into involuntary declarations those which, after close and conscientious scrutiny at trial, have been found to be altogether voluntary. These cases do no more than announce that certain circumstances are "significant" as "factors tending to prove" coercion or other unfair influence. Johnson v. State of New Jersey, supra, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (June 20, 1966). Moreover, save *Haynes*, their history offers no resemblance to the frame of the present admissions and confession.

Voluntariness in fact has always been, and remains, the standard and the determinative inquiry. Davis v. State of North Carolina, supra, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (June 20, 1966). See Haynes v. State of Washington, supra, 373 U.S. 503, 513-514, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). In *Davis* the Court stated: "The sole issue presented for review is whether the confessions were voluntarily given or were the result of overbearing by police authorities." The Federal district court, to repeat, found that Ledbetter's statements were not the issue of threats, promises or force of any sort. Nor, looking at the atmosphere and occasions of his criminations, can they be typed as involuntary by reason of their setting.

Ledbetter was 19 years of age; his education included completion of the eighth grade. He was brought to the police station between the hours of three and five o'clock in the afternoon of August 11, 1959. The sergeant in charge was then taking the written statement of Dennis, an accomplice. Waiting for the sergeant, Ledbetter "was kept for a while in a small room, with Officer Moser standing guard

at the door". With the door open, Moser was inside. Ledbetter and the officer talked on many matters before the conversation turned to the fatal assault. In plain sight of him, Moser noted on a pad what Ledbetter was saying — and while he was saying it. These oral statements by Ledbetter indicated his before-the-fact knowledge of the attack.

About 8:25 P.M. Ledbetter was taken to the sergeant's room. There Dennis' statement was read to him. It implicated Ledbetter as an active participant in the murder, and Ledbetter acknowledged its general correctness. A separate written statement, executed by him around 10:20 the same evening, did not include the more damaging oral inculpation of preknowledge.

The grounds asserted for invalidating the oral admissions and written confession are these: Ledbetter had been refused use of the telephone to call his aunt and uncle with whom he lived; he was not told of his right to remain silent or that any statement he made might be used against him; and he was not advised of his right to a lawyer. But all of this occurred in Haynes v. State of Washington, supra, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513, the factually nearest to the instant case of all those cited to overthrow the conviction. The Supreme Court did not there cry down the *oral* admissions made by Haynes soon after his arrest. It denunciated only his written statement, taken after an overnight detention incommunicado.

As Ledbetter's written confession was not so accusatory as were his oral statements, with the latter clearly admissible it was to his advantage to have the written confession in evidence. Nor was it vulnerable like the *Haynes* written confession, as only two hours were occupied in taking it. This period included the reading of Dennis' statement and the questioning, typing, submission and signing of Ledbetter's. The oral admissions to Officer Moser were made after Ledbetter had been at the station house only an hour. In all, Ledbetter was in custody not more than six hours for interrogation, during which, the District Court repeatedly stresses, "No threats or promises were made to

Ledbetter, and no force was used". I cannot agree that these circumstances spell coercion in fact or in law.

Of questioning similar in character, or even more pressing than Ledbetter's, the Court said in Miranda v. State of Arizona, supra, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (June 13, 1966), "In these cases we might not find the defendant's statements to have been involuntary in traditional terms". The instant case *must* be measured for voluntariness in "traditional terms" for it was concluded before *Miranda* and *Escobedo*. See Johnson v. State of New Jersey, supra, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (June 20, 1966).

Referring to "the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance" as factors tending to show involuntariness, the Court said in Johnson v. State of New Jersey, supra, "Prior to *Escobedo* and *Miranda*, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See Crooker v. State of California, 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958); Cicenia v. Lagay, 357 U.S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding [since *Escobedo* and *Miranda*, see footnote 48 in *Miranda*], in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*."

With this dilution of the warning and non-access factors, and with *Escobedo's* requirement of counsel rendered inapplicable here by *Johnson* — the very predicates of the decision of the District Court and now of this court — the unduressed statements of Ledbetter should not be declared involuntary to relieve him of condign conviction and sentence.

I am authorized to add that Judge HAYNSWORTH joins in this dissent insofar as it differs from the majority on the merits.

JUDGMENT

(Filed September 22, 1966)

United States Court of Appeals
For The Fourth Circuit

No. 10,154

John Frank Ledbetter, Jr.,
Appellee,

v.

Warden, Maryland Penitentiary,
Appellant.

Appeal the United States District Court
for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed with costs.

SIMON E. SOBELOFF,
United States Circuit Judge.

A true copy,

Teste:

MAURICE S. DEAN,
Clerk,
U.S. Court of Appeals for the
Fourth Circuit.

(Seal)

APPENDIX B

OPINION OF COURT

United States District Court
for the District of Maryland

Civil No. 14551

John Frank Ledbetter, Jr.

v.

Warden, Maryland Penitentiary

Robert M. Carrico, Jr., court-appointed, Baltimore, Md., for petitioner.

Thomas B. Finan, Atty. Gen. of Maryland, and R. Randolph Victor, Asst. Atty. Gen., Baltimore, Md., for respondent.

THOMSEN, Chief Judge.

Petitioner (Ledbetter) was convicted of first degree murder by a jury in the Criminal Court of Baltimore on February 24, 1960, and was sentenced to life imprisonment. The death resulted from the brutal slugging and robbing of an old man by four 19-year-old youths. Ledbetter was represented at his trial, which was held after the trials of the other three youth, by an experienced criminal lawyer, engaged by his family. The same attorney and his associate represented him on the original appeal, which resulted in an affirmance of the conviction. Ledbetter v. State, 224 Md. 271, 167 A. 2d 596 (1961).[1]

[1] The points argued were the sufficiency of the evidence to sustain the verdict, the claimed inconsistency between the verdict of not guilty of robbery and the verdict of guilty of murder.

In an application for relief under the Post Conviction Procedure Act (PCPA), filed in 1963, Ledbetter raised six points. At the hearing on that application, the attorney who had been appointed to represent him in the PCPA proceeding advised the Court that Ledbetter was making ten additional complaints, but that in the attorney's opinion none of the contentions had any merit. No testimony was taken, and the Court denied relief, concluding that the legality of the arrest, the legality of a search, and the voluntariness of the confession or admissions could not be raised in a post conviction proceeding. The Court of Appeals disagreed with that conclusion, but denied leave to appeal. Ledbetter v. Warden, 234 Md. 643, 200 A. 2d 81 (1964).[2]

The present petition filed in this Court raises thirteen points, similar to those raised in the PCPA proceeding, to which Ledbetter's present court-appointed counsel has added one. With Ledbetter's approval, his counsel has withdrawn three of the fourteen points[3] and consolidated some of the others, so that the points now being pressed are: (A) faulty indictment; (B) inconsistent verdicts; (C) insufficient evidence; (D) false and perjured testimony; (E) illegal arrest; (F) involuntary confession; and (G) ineffective assistance of counsel. Associated with some of these points, particularly the last two, is (H) the question whether Ledbetter waived his constitutional rights.

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[2] Based upon the record at the trial and the PCPA petition, the Court of Appeals said: "The applicant concedes that nothing was taken from his house as a result of the alleged illegal search. Cf. Young v. Warden, 233 Md. 596, 599, 195 A. 2d 713, and Slater v. Warden 233 Md. 609, 611, 195 A. 2d 675. The only tangible property offered in evidence was a ring belonging to the decedent recovered from one of the other boys. According to Ledbetter it was never in his possession. There is nothing to show affirmatively that the arrest of the applicant was illegal. One of the other boys, called Jerry, was identified and told still another boy (who testified at Ledbetter's trial) about the yoking."

[3] (1) That there was an illegal search of his home; (2) that he was denied access to a complete transcript of the trial proceedings; and (3) that he was denied the right to take the witness stand by his attorney. Nothing was taken from the house. The other two points were raised by Ledbetter at the suggestion of fellow inmates of the penitentiary, in utter disregard of the facts.

Testimony has been taken over a period of two days, and the points have been fully briefed and argued. The case illustrates the difficulty of determining the true facts relating to events which occurred more than five years ago. It is almost impossible for police to remember individual cases after four or five years; they must rely on their records, and where, as here, some of the records are inaccurate and some defy clear interpretation, the position of the Court and of conscientious counsel is difficult indeed. In the case at bar, as in many other cases, the difficulty is compounded by the willingness of the petitioner to swear to any facts which his fellow prisoners or his own study of recent decisions lead him to believe will be helpful. So, repeatedly, counsel and the Court must turn over a bushel of chaff in an effort to determine whether any grains of wheat are included therein. This time, one grain has been discovered.

The facts will be stated as briefly as will permit the development of the points which must be decided. The four youths had been drinking together; it is a reasonable inference from all the evidence that they wanted money and decided to rob someone on the street. An old man, walking alone, approached them. According to Ledbetter's confession, Jerry Dennis, one of the four, said: "I'm gonna get this here one." Dennis tied a handkerchief around his knuckles and slugged the old man on the jaw, causing him to fall and strike his head, which resulted in his death. Ledbetter tried to pull the man out of the street where he had fallen, while the other two robbed him of money and a ring. They left the victim where he lay, and when the police found him, it was thought at first he had had a stroke. After the victim's wife told them that money and a ring had been taken, and an autopsy showed the injuries, the police began to search for the robbers. After questioning a number of suspects, the police arrested Jerry Dennis on the morning of August 11. He confessed and implicated three others, including Ledbetter and Taylor, who were arrested at the restaurant where they worked between 3:00 and 5:00 p.m. the same day. The records are not clear whether Ledbetter was charged with murder and robbery as soon as he was brought to the Western Police Station or later,

after he had been questioned, but Sergeant Kendrick, who issued the arrest order, testified that he regarded Ledbetter as a principal and that Ledbetter was brought in to be charged. Sergeant Kendrick was taking a written statement from Dennis when Ledbetter arrived at the station, so Ledbetter was kept for a while in a small room, with Officer Moser standing guard at the door. Officer Moser led the conversation around to the robbery, and Ledbetter made some damaging admissions, which Officer Moser noted on a pad and related at the trial. Neither before nor during that conversation did Officer Moser or anyone else advise Ledbetter of his right to remain silent, of his right to an attorney, or that any statement he made might be used against him. No threats or promises were made, and Ledbetter did not ask to consult an attorney. However, on conflicting evidence the Court finds that he did ask permission to telephone his family, his aunt and uncle with whom he lived and who later obtained a competent attorney for him. Such a request was made and denied before Ledbetter made the damaging admissions.

Later, about 8:30 p.m., Ledbetter was interviewed by Sergeant Kendrick, who was assisted by five other officers, Sergeant Donohue, Officers Moser and Clark, and Detectives Rawlings and Keefer. The statement just given by Dennis was read to Ledbetter and he agreed with it in general. Ledbetter gave his own signed statement in which he said that he did not know a robbery was planned until he heard Jerry say "I'm gonna get this here one". However, the tenor of the statement and the other facts indicate that he must have known that a robbery was contemplated. No threats or promises were made to Ledbetter, and no force was used, but it was admitted by the police that he was not told that he had a right to remain silent, that he had a right to an attorney, or that any statement he made might be used against him; and, as found above, he had been refused permission to call his family. At the trial Sergeant John Donohue testified that, in the interrogation room before the written statement was given, Ledbetter had said, "we were going to rob him, yoke him". This ad-

mission was not included in the written statement, which was completed about 10:20 p.m.

Ledbetter has also testified that he complained of a headache and was told he could have medication only after he had given his statement. This was denied by police, and on the conflicting testimony, this Court does not find that such a complaint was made.

Taylor's statement was taken the next morning. When it was completed the three youths were taken to the Central Police Station, where the magistrates' "homicide court" was held daily at 3:00 p.m., before the creation of the Municipal Court of Baltimore City. The docket entries for the 3:00 p.m. session that day are so confusing that it is impossible to tell even who presided. None of the youths was represented by counsel at the hearing. The record shows that all three of them entered pleas of guilty of murder, not guilty of robbery. Ledbetter testified in this Court that he entered a plea of guilty to robbery but not guilty of murder. They were held without bail for action of the grand jury.

With the approval of the Judge presiding in Part One of the Criminal Court of Baltimore, the Assistant Attorney General has presented to this Court evidence which shows that the pleas taken at the magistrate's hearing were not brought to the attention of the grand jury. They were not referred to at Ledbetter's trial.

Ledbetter's counsel, obtained by his family, prepared the case for trial in the customary manner in which he prepared cases in 1959. The practice has changed since then. He had a copy of the signed statement, but had apparently not been told by his client about any oral statements. He was surprised when the testimony relating to an oral statement was first offered. He told the Court that he had no objection to the evidence, but he evidently thought that what was about to be offered was the signed statement, which he thought was "fairly favorable" and upon which, wisely or unwisely, he was apparently intending to base an argument. Ledbetter's counsel did not offer a motion for a

directed verdict; but after the oral statements were admitted, there was undoubtedly enough evidence to go to the jury, and Ledbetter was not prejudiced by the failure. The jury found Ledbetter guilty of first degree murder, without capital punishment, and not guilty of robbery.

Based upon the foregoing findings of historical fact, this Court makes the following ultimate findings and conclusions:

(A) The entry of a guilty plea at the hearing before the magistrate did not render the indictment faulty, since the plea was not brought to the attention of the grand jury. De Toro v. Pepersack, 4 Cir., 332 F. 2d 341 (1964). Nor was it brought to the attention of the petit jury.

(B) The fact that the jury found Ledbetter guilty of murder and not guilty of robbery does not require that the guilty verdict be stricken. This point was fully covered by Judge Hammond's opinion on direct appeal from the conviction. Ledbetter v. State, 224 Md. at 273, 167 A. 2d 596, et seq.

(C) The Court of Appeals held that it could not review the sufficiency of the evidence because there had been no motion for a directed verdict. 224 Md. at 273, 167 A. 2d 596. If the oral admissions were properly before the jury, however, there can be little or no doubt that the evidence was legally sufficient to convict Ledbetter of first degree murder.

(D) Although the evidence presented in this Court raises some doubt as to whether the testimony with respect to the admissions offered by the State at the trial was entirely accurate, this Court does not find that any perjured testimony was knowingly offered by the State or given by any of the police witnesses.

(E) The arrest was legal. The police had sufficient probable cause to arrest Ledbetter. Kerr v. State of California, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); Ralph V. Pepersack, 4 Cir., 335 F. 2d 128 (1964);

Bowler v. Warden, Maryland Penitentiary, 4 Cir., 334 F. 2d 202 (1964); Mulcahy v. State, 221 Md. 413, 158 A. 2d 80 (1960).

(F), (G), (H) Under the tests which must now be applied by the State Courts as well as by this Court, the signed statement given by Ledbetter to Officer Kendrick and the other officers who were questioning him, together with the oral admissions testified to at the trial by Officer Moser and Officer Donohue, must be considered to have been involuntary or coerced by the totality of the circumstances. Haynes v. State of Washington, 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). See also Miller v. Warden, 4 Cir., 338 F. 2d 201 (1964); Theiss v. State, 235 Md. 541, 201 A. 2d 490 (1964); Culombe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). Cf. Davis v. State of North Carolina, 4 Cir., 339 F. 2d 770 (1965); Mefford v. State, 235 Md. 497, 201 A. 2d 824 (1964). The use in evidence of his written statement and the oral admissions deprived Ledbetter of a constitutional right guaranteed to him by the Fourteenth Amendment, unless he knowingly waived his rights.

This Court cannot accept on this point the rulings of the State Courts in the PCPA proceeding, in view of Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), but must make its own findings of fact as well as conclusions of law. It is true that Ledbetter's trial counsel stated that he had no objection to the admission of any of the oral or written statements, but this was apparently said in the belief that only the signed statement was to be offered. In any event, the evidence indicates that counsel took that position without consulting Ledbetter. Ordinarily such consultation is not necessary where competent counsel is conducting a difficult trial. Here, however, there was no other evidence in the case connecting Ledbetter with the crime. There is no evidence that Ledbetter knew of the constitu-

tional rights involved. And it appears from the evidence that trial counsel did not give as much attention to the preparation of this point as he would give today, in view of the recent Supreme Court decisions. Under all the circumstances the Court cannot say that Ledbetter's representation by his trial counsel fell below the standard established by Snead v. Smythe, 4 Cir., 273 F. 2d 838 (1959), and later Fourth Circuit cases. On the other hand, this Court cannot say that there was any such waiver of constitutional rights as would meet the tests prescribed by Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1937); Walker v. Pepersack, 4 Cir., 316 F. 2d 119 (1963); Jones v. Cunningham, 4 Cir., 313 F. 2d 347 (1963); Bowler v. Warden, Maryland Penitentiary, 4 Cir., 334 F. 2d 202 (1964). Cf. Henry v. State of Mississippi, 85 S. Ct. 564 (1965).

It follows that Ledbetter must be released unless the State elects to retry him and does so within a reasonable time. Counsel should prepare an appropriate order.

The Court expresses its appreciation to Mr. Carrico for his conscientious and able presentation of his client's case.

ORDER OF COURT

(Filed April 5, 1965)

Whereas, the above entitled matter having come on for hearing in this Court on the 23rd and 24th day of February and the 5th day of March, 1965; and

Whereas, the petition in said cause, together with the proofs of the respective parties, having been heard and considered by the Court, and the Court having heard and considered argument of counsel for the respective parties and being fully advised in the premises, it appears to the Court that the Petitioner, John Frank Ledbetter, Jr., is being unlawfully detained in the custody of the Respondent, Warden of the Maryland Penitentiary.

It is, therefore, ORDERED by this Court, this 5th day of April, 1965, that the said Petitioner, John Frank Ledbetter, Jr., will be released unless the State of Maryland enters an appeal within the time prescribed by the rules of Court, or elects to retry the Petitioner within a period of thirty days from the date of this order.

ROSZEL C. THOMSEN,

Chief Judge, U.S. District Court
For the District of Maryland.

Consent is hereby given to passage of the above order.

ROBERT M. CARRICO, JR.,

Attorney for Petitioner,

THOMAS B. FINAN,

Attorney General of Maryland,

R. RANDOLPH VICTOR,

Asst. Attorney General of Maryland.

True Copy Test:

WILFRED W. BUTSCHKY, Clerk.

By: MARY JANE GRIES, Deputy Clerk.

APPENDIX C

OPINION OF COURT OF APPEALS OF MARYLAND

Ledbetter v. State of Maryland

(No. 136, September Term, 1960)

Decided February 8, 1961

Appeal from the Criminal Court of Baltimore (Byrnes, J.)

Argued before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

Norman N. Yankellow, with whom was *Joseph Rosenthal* on the brief, for appellant.

Robert C. Murphy, Assistant Attorney General, with whom were *C. Ferdinand Sybert, Attorney General, Saul A. Harris* and *James W. Murphy, State's Attorney* and *Assistant State's Attorney*, respectively, on the brief, for appellee.

HAMMOND, J., delivered the opinion of the Court.

John Frank Ledbetter, Jr., appellant, claims on appeal that the jury's verdict of guilty of murder (without capital punishment) was inconsistent with their verdict of not guilty of robbery, and must fall because if there was evidence sufficient to justify the murder verdict, which he denies, that evidence was that the killing occurred in the perpetration of a robbery.

We find in the record testimony including an oral and a written confession of appellant, which were exculpatory in part, from which the jury could have found as facts that: four negro youths, Jerry, Eddie, Bones, and appellant, de-

cided to rob an elderly man on a Baltimore street corner about ten o'clock one August evening in order to get more wine to drink; Jerry hit the man on the jaw and knocked him down so that the back of his head hit the street or the curb; before Jerry hit the man appellant knew they were going to rob him; Eddie and Bones took a small amount of money and a ring from the man; appellant grabbed the victim's left arm and tried to pull him back to the curb; the four fled hurriedly because several people had seen the incident; immediately after the robbery the four regathered in an alley and drank some wine one of them bought; later, three of them went to appellant's house and Bones told appellant of taking the ring; the victim of the robbery died several hours after being struck from the blows to the face and head.

Appellant's contention that the evidence was insufficient to sustain the verdict of guilty of murder cannot be considered because no motion for a directed verdict was made at any stage of the trial. Under Art. XV, Sec. 5 of the Constitution of Maryland, Code (1957), Art. 27, Sec. 593, and Maryland Rule 738, appellate review of the sufficiency of the evidence in a criminal case before a jury is predicated entirely upon the refusal of the court to grant a motion for a directed verdict of not guilty. In the absence of such a motion below, "there can be no review of the sufficiency of the evidence." *Auchinclose v. State,* 200 Md. 310, 315; the law on the point was fully reviewed in *Woodell v. State,* 223 Md. 89.

Appellant cannot prevail in his second contention that the claimed inconsistency between the verdict of not guilty of robbery and the verdict of guilty of murder must cause the guilty verdict to be stricken. Some courts hold, as appellant urges us to hold, as cases in the annotation in 80 A.L.R. 171 disclose. Others, including the lower Federal courts, the Supreme Court and this Court, have taken the opposite view. *Steckler v. United States* (C.C.A. 2d), 7 F. 2d 59, 60; *Dunn v. United States,* 284 U.S. 390, 393, 76 L. Ed. 356, 358; *United States v. Dotterweich,* 320 U.S. 277,

88 L. Ed. 48; *Leet v. State*, 203 Md. 285, 293, 294; *Williams v. State*, 204 Md. 55, 64.

In the *Dunn* case, Mr. Justice Holmes said for the Court: "Consistency in the verdict is not necessary. * * * That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

In *Leet* we held that possible inconsistency between acquittal of wilful failure to pay income tax and conviction of wilful failure to file a return did not require reversal. The *Dunn* case was quoted, as was the language of Judge Learned Hand in *Steckler v. United States, supra*, that "the most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." Judge Sobeloff said for the Court: "If we nevertheless assume that there was an inconsistency, the result is not necessarily to reverse the conviction. While it is true that a finding of *guilt* on two inconsistent counts will be declared invalid in Maryland, *Heinze v. State*, 184 Md. 613, 617, 42 A. 2d 128, 130,[1] it does not follow that a conviction on one count may not stand because of an inconsistent acquittal on another count." The same holding was made in *Williams* as to claimed inconsistency between innocence of disorderly conduct and guilt of assault. It was said that *Leet* "held that a conviction on one count may stand even in the face of an inconsistent acquittal on another count. Each count of an indictment is regarded as if it were a separate indictment, and the inquiry is whether the evidence is sufficient to support the conviction on that count without regard to the disposition of other counts." We have noted earlier that the matter of the sufficiency of the evidence to

[1] In many of the cases involving the question, the point was not raised below and this Court did not pass on the effect of the inconsistency. Novak v. State, 139 Md. 538, 542; Bell v. State, 220 Md. 75, 81; Hardesty v. State, 223 Md. 559, 562.

support the murder verdict was for the jury, and is not before us for review.

We have dealt with appellant's argument on this point on the premise that the two verdicts were inconsistent, but in the jury's mind they may well have resulted from a planned consistency. Judge Byrnes charged the jury in the terms of Code (1957), Art. 27, Sec. 410 (which appellant's counsel said were acceptable), that under the law of Maryland "any murder which shall be committed in the perpetration of or attempt to perpetrate any robbery shall be murder in the first degree."

The jury could have concluded without being completely illogical that appellant attempted to rob the victim but did not personally succeed, and acquitted him of robbery, while finding him guilty of murder under the evidence because, in the words of the charge, he was "acting in a common design or purpose" with his three companions and therefore was "responsible" for everything done by his confederates which reasonably follow in the execution of that design as one of its probable consequences, even though it may not have been intended as part of the original plan * * *."

Judgment Affirmed.

APPENDIX D

OPINION OF COURT OF APPEALS OF MARYLAND ON APPLICATION FOR LEAVE TO APPEAL UNDER THE POST CONVICTION ACT

Ledbetter v. Warden of the Maryland Penitentiary

(App. No. 95, September Term, 1963)

Decided May 4, 1964

Before HENDERSON, HAMMOND, PRESCOTT, HORNEY and MARBURY, JJ.

HENDERSON, J., delivered the opinion of the Court.

In this application for leave to appeal from a denial of post conviction relief, the applicant raised some sixteen questions, all but two of which were adequately answered by Judge Foster in the court below. Ledbetter was tried and convicted in 1960, along with three other boys, of first degree murder in a yoking case. All were sentenced to life imprisonment. Ledbetter appealed to this Court and the judgment was affirmed. *Ledbetter v. State*, 224 Md. 271. The only points raised on appeal were the sufficiency of the evidence and inconsistency in the verdicts (he was acquitted of robbery). In the present proceeding he contends that his arrest and a search of his house were illegal, and that his confessions were involuntary.

Judge Foster dismissed these contentions with the statement that they cannot be raised in a post conviction proceeding. That is no longer true since the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), and later Supreme Court decisions. Some matters formerly treated as procedural, or

mere rules of evidence, have now been elevated to the status of constitutional rights. See *Edwards v. Warden,* 232 Md. 667, 668, and *Davis v. Warden,* 232 Md. 670. The original trial in the instant case was before *Mapp.* But the record extract in the former appeal shows clearly that the present contentions are without merit, so we find it unnecessary to remand the case for further consideration by the court below. Cf. *Boston v. Warden,* 233 Md. 623, 624, and *Dyson v. Warden,* 233 Md. 630, 634, even if we assume that *Mapp* is retroactive.

The applicant concedes that nothing was taken from his house as a result of the alleged illegal search. Cf. *Young v. Warden,* 233 Md. 596, 599, and *Slater v. Warden,* 233 Md. 609, 611. The only tangible property offered in evidence was a ring belonging to the decedent recovered from one of the other boys. According to Ledbetter it was never in his possession. There is nothing to show affirmatively that the arrest of the applicant was illegal. One of the other boys, called Jerry, was identified and told still another boy (who testified at Ledbetter's trial) about the yoking. Presumably the police obtained the names of the other boys from Jerry. It may be inferred that the police had probable cause to arrest upon reliable information, and if they did, the arrest in a felony case was legal, even without a warrant. *Butcholtz v. Warden,* 233 Md. 614, 616. The applicant's only objection seems to be that there was no warrant.

But even if we assume, without deciding, that the arrest was illegal, that fact would not, in and of itself, vitiate the trial, *Piles v. State,* 233 Md. 487, 489; *Howington v. Warden,* 234 Md. 610, 197 A. 2d 918, 919, nor would it render the subsequent confession inadmissible, *Dailey v. State,* 234 Md. 325, and cases cited. That the confession was voluntary was not contested at the trial. The record extract shows that counsel for the accused expressly stated that he had no objection to the testimony of the two police officers who testified that Ledbetter freely told them, without threats or promises of any kind, that he had been in company with the other boys at the time of the assault and robbery, and knew of the plan whereby Jerry would hit

the old man and the others rob him. He participated at least to the extent of dragging the victim back to the curb while the others were going through his pockets. There was also an express disclaimer of any objection to the introduction of a written confession by Ledbetter to participation in the yoking.

Application denied.